

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-2054

To Be Argued By:
STEPHEN M. LATIMER, ESQ.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CRUZ PADRO MARTINEZ,

Plaintiff-Appellant,

-against-

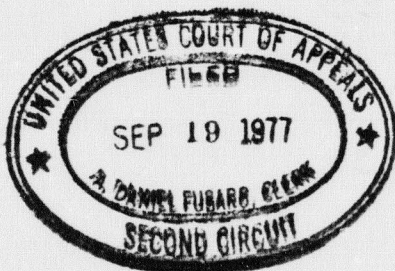
BENJAMIN MALCOLM, individually, and as
Commissioner of Correction of the City of New
York, PETER M. SCHAEFER, individually, and as
Warden of the Manhattan House of Detention for
Men, JAMES GORMAN, individually, and as
Captain of the New York County Court Detention
Pen,

Defendants-Appellees,

DR. "JOHN SANTOS", DR. "R. DANIELS", CAPT. "JOHN"
KING, individually, and in his capacity as
Correction Officer of the City of New York, A.
TURNER, DAVID WHITE, JOHN DOE, No. 1, Shield
No. 1363, JOHN DOE No. 2, Shield No. 1813, JOHN
DOE, No 3, Shield No. 830, JOHN DOE No. 4,
Shield No. 2151, JOHN DOE No. 5, Shield No. 250,
JOHN DOE No. 6, Shield No. 170, JOHN DOE No. 7,
Shield No. 1694, JOHN DOE No. 8, Shield No.
1679, JOHN DOE No. 9, Shield No. 276, JOHN DOE
No. 10, Shield No. 1701, JOHN DOE No. 11,
Shield No. 2067, individually, and as Cor-
rection Officers of the City of New York,

Defendants.

APPELLANT'S BRIEF



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CRUZ PADRO MARTINEZ,

Appellant,

No. 77-2054

-against-

BENJAMIN MALCOLM, et. al.,

Appellees.

APPELLANT'S BRIEF

Preliminary Statement

Plaintiff appeals from a judgment of the United States District Court for the Southern District of New York, dismissing the complaint as to all Defendants (28). The action was tried before the Hon. Dudley B. Bonsal and a jury on March 3, 4 and 8, 1977 on the issue of the liability of Defendants Malcolm, Schaefer and Gorman, for violation of Plaintiff's rights under 42 U.S.C., 1983, while he was in the custody of the New York City Department of Correction. On appeal Plaintiff argues that the verdict dismissing the complaint as to Gorman is against the weight of the evidence, and that the form of the verdict submitted to the jury withdrew from their consideration a valid theory of recovery.

Questions Presented

1. Did submission of one general verdict instead of a separate verdict for each Defendant withdraw a valid theory of recovery as to Defendant Gorman, thereby constituting prejudicial error?

2. Did the refusal of the District Court to submit a general verdict with interrogatories in a multi-party, multi-claim case constitute prejudicial error?

3. Was excessive force used against Plaintiff on July 26, 1973, with personal knowledge and acquiescence of Defendant Gorman?

Statement of the Case

A. Proceedings Below:

On July 26, 1973, Plaintiff was assaulted by several correction officers in the Manhattan Court Detention Pens ("the pens"). On November 26, 1973, he filed an action in the District Court, claiming violations of his Eighth and Fourteenth Amendment rights. Named as Defendants were Benjamin Malcolm, Commissioner of Correction, Peter M. Schaefer, Warden of the Manhattan House of Detention for Men ("the Tombs"); James Gorman, Captain in charge of the pens and various correction officers identified as "John Doe." The Defendants moved to dismiss and on February 7, 1974 the motion was granted

with leave to Plaintiff to file an amended complaint (6).

On February 27, 1974, Plaintiff filed an amended complaint, alleging in addition to the July 26, 1973 incident, violations of constitutional rights arising from incidents on December 11, 1973 and January 15, 1974 (8-14). Defendants again moved to dismiss the amended complaint. By decision dated April 16, 1974, the motion was denied (15-19), and an order to that effect was entered (20).

The action was tried as to Defendants Malcolm, Schaefer and Gorman before Judge Bonsal and a jury of six persons, none of the remaining Defendants having been served with process. Defendants' motion to dismiss at the close of the evidence was denied. The Court instructed the jury to return a general verdict. After deliberation, the jury returned a verdict in favor of Defendants. Plaintiff's motion for judgment notwithstanding the verdict or for a new trial was denied. Plaintiff filed a Notice of Appeal (29).

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B. Facts

On July 26, 1973, Plaintiff was in a holding cell at Part 39 in the pens waiting to return to the Tombs after a Court appearance. At about 12:00 noon, an incident occurred

1. Plaintiff concedes that the trial evidence was insufficient to establish liability of Defendant Malcolm for any of the alleged violations, and of Defendant Schaefer for the December 11, 1973 and January 15, 1974 incidents. The Brief shall only be concerned with Gorman's liability for the July 26, 1973 assault.

in which Plaintiff was beaten by several correction officers. He was injured. The Department of Correction Injury to Inmate Report (Plaintiff's Exhibit 4) (32), states: "Inmate bleeding from mouth." He was eventually taken to Bellevue Hospital where x-rays revealed a fracture of the zygomatic bone (Plaintiff's Exhibit 5 (33)). Surgery was performed on August 7, 1973 at Bellevue Hospital (Plaintiff's Exhibit 5) (34).

Plaintiff and James Lee Sims testified for Plaintiff. Capt. Merante, C.O. Tudor, C.O. Hartman, C.O. Bowens, C.O. McNulty and Capt. Gorman testified for Defendants about the July 26, 1973 incident. Much of the testimony is not in conflict. All witnesses agree that when inmates were called to go back Rikers Island an inmate cursed Tudor who then called Plaintiff out of the pen. Tudor, however, testified that he does not know who cursed at him. When Plaintiff came out an altercation started between Tudor and him. C.O. Bowens appeared on the scene and he and Tudor forced Plaintiff into an adjacent cell. Bowens testified that there were four correction officers, plus Plaintiff in a cell approximately four feet wide by seven feet long. He said that he hit the alarm and several correction officers responded.

C.O. McNulty testified that he responded to the alarm. When he arrived at Part 39, there were ten or eleven correction officers on the scene. Capt. Merante testified that Plaintiff was handcuffed and leg restraints were put on him. He was taken to a cell near Part 31. Capt. Gorman arrived on

the scene when Plaintiff had been cuffed. He ordered the transfer to Part 31. Plaintiff was eventually taken to the basement to be put in a van and taken to the prison hospital on Rikers Island. Gorman testified that he gave the orders, and that Plaintiff was dragged to the van. Gorman also stated that he saw bruises on Plaintiff's eye or on the side of his face.

Plaintiff arrived at Bellevue Hospital on August 3, 1973 where his injury was diagnosed as a fracture of the zygomatic bone. There was no evidence of intervening injury.

There was conflicting testimony about who struck the first blow when Plaintiff was initially summoned from the cell by Tudor. That fact is irrelevant in light of the subsequent force employed against him by as many as eleven untrained correction officers (see Post. p. 13-15).

Plaintiff claims he was beaten after he was taken to Part 31. The correction officers testified that they saw no one strike Plaintiff. Plaintiff's broken cheekbone and the testimony of Defendant Gorman that he observed injuries to Plaintiff's face give the lie to the guards testimony.

Gorman's testimony places him on the scene and in charge. The use of force is admitted. The issue is whether that force was excessive. Each correction officer testified on cross examination, that: 1) he had never received training in restraining an unruly inmate² and, 2) he had never used more

2. Gorman testified that a Capt. Ruder was the training officer, and that Ruder reports to him.

than two or three guards to restrain an inmate. Had the jury been instructed to consider separate verdicts, it could have reasonably concluded that excessive force was used against Plaintiff, and that Gorman was liable therefor.

C. The Jury Submission

Prior to charging the jury, the Court conferred with counsel as to requests to charge and the form of the verdict. Defendants' counsel requested that interrogatories be propounded. Both sides submitted interrogatories (Court Exhibits 2 and 3) (47, 48) and both counsel requested separate verdicts. Judge Bonsal considered counsels' requests and indicated that he would instruct the jury to return separate verdicts, but would only propound interrogatories if the jury returned a verdict for Plaintiff. A copy of the Court's proposed interrogatories is attached as Annex A.

The Court charged the jury, among other things, that to return a verdict for Plaintiff he must prove by a fair preponderance of the evidence that on July 26, 1973 Plaintiff was beaten by correction officers, and that they were under control of the three Defendants. Plaintiff excepted to this charge on the ground that the officers need only be under the control of any one Defendant.

The Court continued to charge the jury as to liability of the three Defendants as if all three must be liable or none are. The Court did not instruct the jury that they could find against any one defendant or all of them. The Court then

instructed the jury to return a single unanimous verdict. Plaintiff excepted.

After deliberating for an hour and a half, the jury submitted a note asking "Are we voting on one count or three separate counts?" (Court Exhibit 1) (46). After a conference with counsel, the Court decided to submit interrogatories to the jury. While the judge was instructing the jury on the use of interrogatories, the foreman announced a verdict for defendants.

Point I

SUBMISSION OF ONE GENERAL VERDICT
INSTEAD OF A SEPARATE GENERAL
VERDICT FOR EACH DEFENDANT WITH-
DREW FROM THE JURY A VALID THEORY
OF RECOVERY AGAINST GORMAN AND WAS
PREJUDICIAL ERROR.

The test for liability under 42 U.S.C., §1983, where excessive use of force is alleged was stated in Johnson v. Glick, 481 F.2d 1028 1033 (2d Cir. 1973):

In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need, and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

In addition, the Johnson Court held that for a high prison

official to be liable, he must have had some personal involvement in the brutality. Plaintiff concedes that as to Malcolm and Schaefer there was no evidence upon which the jury could find for Plaintiff. However, as shown in Point III, post, had the court not submitted a joint general verdict for all three defendants, the jury could have reasonably found that within the meaning of Johnson, on July 26, 1973 excessive force was used against Plaintiff, and that Gorman had the requisite personal responsibility. The claims against Malcolm Schaefer and Gorman were thus separate and distinct. Schaefer is not responsible for the beating in the pen on July 26, 1973, and there is little evidence to connect him to the other incidents. Malcolm has overall responsibility for the administration of the Department of Correction. But, there was no evidence adduced which would charge him with actual knowledge of any of the incidents alleged. c.f. U.S. Fidelity & Guaranty Co. v. Brian, 337 F.2d 881 (5th Cir. 1964).

The question is, did the court's instruction, and submission of a single verdict as to all three defendants confuse or mislead the jury. Moore v. South African Marine Corp. Ltd., 469 F.2d 280 (5th Cir. 1972). If it "prejudicially operated to throw the issues out of, or not bring them into, a fair and intelligible focus" then the jury may have been misled. Louisville & N.R. Co. v. Botts, 173 F.2d 164, 169, (8th Cir. 1949). The instant case presented three claims to the jury, and different possible liability for each defendant. The words

of the Third Circuit are apropos:

"Where as here, a general verdict may rest on either of two claims -- one supported by the evidence and the other not -- a judgment thereon must be reversed."

Albergo v. Reading Co., 372 F.2d. 83, 86, (3rd Cir., 1966) citing Fatovic v. Nederlansch Americaansche Stoomvart, 275 F.2d 188, (2d Cir., 1960).

In lieu of separate verdicts, the District Court, on the record before it, might have dismissed as to Malcolm and Schaefer at the close of the evidence. By doing neither, the Court submitted to the jury a claim that should not have been submitted. In that case a general verdict cannot stand.

United New York and New Jersey Sandy Hook Pilots Assn. v. Halecki, 358 U.S. 613, 619 (1959), Morrissey v. National Maritime Union, 544 F.2d. 19, 26 (2d Cir. 1976), and cases cited therein. There is a qualification. If the Appellate Court is convinced that the jury proceeded only on the sound ground the error may be disregarded. However, the Court, in Morrissey cautioned that "qualification on the general rule in Halecki and other cases must be kept within rather strict bounds" 544 F.2d at 27.

In this case, it is far from clear that the jury proceeded on the sound grounds. Their confusion is manifest by their request to the court as to whether they were considering one count or three (Court Exhibit 1) (46). In light of that

confusion, this court should reverse and remand on the issue of Gorman's liability. Fatovic, supra; Albergo, supra.

Point II

THE REFUSAL TO SUBMIT A GENERAL VERDICT WITH INTERROGATORIES IN A MULTI-PARTY, MULTI-CLAIM CASE WAS PREJUDICIAL ERROR.

That the trial court has wide discretion in the form of verdict and the use of interrogatories is beyond dispute. That discretion is not absolute, however.

"And this discretion extends to determining the form of special verdict and interrogatories * * *," R.H. Baker v. Smith-Blair, Inc., 331 F.2d 506, 508 (9th Cir. 1964). The only limitation is that the questions asked of the jury be adequate to determine the factual issues essential to the judgment. Id. We caution that a trial judge should not fashion interrogatories in such manner that he withdraws from the jury valid theories of recovery, if such theories are supported by the evidence."

Kornicki v. Calmar S.S. Corp., 460 F.2d. 1134, 1139 (3rd Cir. 1972). In this case, interrogatories were prepared by Plaintiff, Defendant (47-48), and the Court (see Annex A), but were never used. Clearly, there was some thought that the jury might be confused by the multiple claims and different responsibility of the Defendants. The use of interrogatories after verdict in the manner proposed by the District Court had the effect of

withdrawing from the jury a theory of recovery against Gorman alone.

It is precisely for this situation that F.R.C.P., 49 (b) and its procedure were adopted. The Fifth Circuit has been a leading exponent of the use of general verdict and interrogatories. See, e.g., Nesmith v. Alford, 318 F.2d. 110 (5th Cir., 1963), at p. 125 n. 30 and cases cited therein. In American Oil Company v. Hart, 356 F.2d 657 (5th Cir., 1966), the Court stated the rationale:

By the use of interrogatories as a part of, and in conjunction with, a general charge, F.R.Civ.P. 49 (a), a procedural device often having much appeal as the trial Court exercises its discretion in the choice of the manner of jury submission especially in complex areas of multiple claims-multiple parties, and the like, we know precisely what the jury found.

* * *

Based on these findings and the record, we are able to make precise legal conclusions. 356 F.2d. at 659.

The case of In Re Double D. Dredging Co., 467 F.2d 468 (5th Cir., 1972), is more in point. From notes directed from the jury during its deliberation, it appeared that an issue of the vessels navigability was pivotal in its general verdict. The Court stated at 467 F.2d. at 469 n. 3:

What was in fact the course of the jury's deliberation under the general charge will remain an enigma wrapped in a mystery. If we knew we might be able to render judgment for one of these litigants. This case proves again the value of the general charge with special interrogatories under F.R.Civ.P. 49(a). For example, if the jury had answered special interrogatories except navigability and seamen status in appellant's favor we could render judgment for appellant since we would disregard those unfavorable answers as a matter of law. See Brown, Federal Special Verdicts: The Doubt Eliminator, 1968, 44 F.R.D. 338; United States Lines Co. v. Williams, 5 Cir., 1966, 365 F.2d. 332, 1966 A.M.C. 2418.

So here. The personal knowledge of each Defendant for each incident was pivotal. If the jury had answered interrogatories pertaining to Gorman favorably to Plaintiff, F.R.C.P. 49 (b) permits the Court to enter judgment "in accordance with the answers notwithstanding the general verdict." See 5 A Moores Federal Practice § 49.04 at p. 2223. Barnes v. Brown, 430 F.2d. 578 (2d Cir. 1970). Without the interrogatories and in view of the jury's apparent confusion as to whether to consider one count or three, (Court Exhibit 1), the "course of the jury's deliberation under the general charge will remain an enigma wrapped in a mystery."

Point III

DEFENDANT GORMAN WAS LIABLE
FOR THE USE OF EXCESSIVE FORCE
AGAINST PLAINTIFF.

The constitutional standard enunciated in Johnson v. Glick, supra, to determine whether force was excessive is cited at page 7, ante. Plaintiff argues that he satisfied his burden of proof as to each element, and that had the Court properly submitted the case to the jury, the jury could reasonably have found in his favor against Defendant Gorman.

A. The Need For The Application of Force

If the situation resulting in the use of force is precipitated by actions of the correction officers, then they will be liable for injuries suffered by the prisoner, Vargas v. Correa, No. 74 Civ. 1257 (J.M.C.) (S.D.N.Y. March 3, 1976), Myles v. Fackenstein, 317 So.2d. 292 (La. App. 1975). Admittedly, there is conflicting testimony as to who struck the first blow. However, subsequent events, Gorman's presence and actions, and Plaintiff's injuries make that fact immaterial. Harris v. Chanclor, 537 F.2d. 203 (5th Cir., 1976). The important fact is that Gorman was present when the ten or eleven correction officers beat Plaintiff, and he did nothing to stop them. He is therefore liable Id., Johnson v. Glick, supra.

B. The Amount of Force Used

Even if Tudor had to use force to restrain Plaintiff and put him back in the cell, and if the situation could be considered an emergency, Gorman would be insulated from liability only if there was no calculated harm. Arroyo v. Schaefer, 548 F.2d 47, 50, (2d Cir. 1977).

Assuming, without conceding, a state of facts most favorable to Defendants, there was a fear that Plaintiff might stir up trouble if not restrained, Tudor then may have been justified in calling assistance to restrain him. However, in the words of this Court in Arroyo, 548 F.2d at 50:

The prison authorities here were suddenly confronted with an obstreperous inmate to whose aid others might come if released from their cells. The avoidance of a riot that might be difficult to quell is surely a desideratum of a reasonable prison administration. To be sure, emergency does not excuse irresponsibility. Thus, if bullets had been fired in a fashion so indiscriminate as to inflict bodily harm on innocent inmates, the civil rights issue would be different. (Emphasis supplied).

While no bullets were fired, the amount of force used against Plaintiff exceeded the experience of each correction officer who testified. Gorman, the officer-in-charge, had the responsibility to limit the force used. His failure to do so subjects him to liability. Johnson, supra, Harris, supra. Correction Officers Tudor, McNulty, Bowen and Hartman each testified that in their experience only two or three guards are necessary to subdue an unruly inmate. Yet, at an early point in the incident, four guards were with Plaintiff in a small four by seven-foot cell. Later, by Defendants' own evidence, as many as eleven officers participated in Plaintiff's subjugation. This is a far cry from the Arroyo situation where

tear gas of such a low order was used that attending nurses did not even need protective gas masks. Thus, the jury, if properly instructed could reasonably have found that the degree of force used was not a good faith effort to maintain discipline, but rather was employed "maliciously and sadistically for the very purpose of causing harm." Johnson, supra, 481 F.2d. at 1033.

C. Plaintiff's Injuries

Defendants' witnesses, most notably Gorman, testified that Plaintiff suffered injuries to his face. Rather than return him to his cell in the Tombs where he would go on sick call, Plaintiff was taken immediately to the hospital on Rikers Island. On August 3, 1973, he was transferred to Bellevue Hospital. While no medical treatment records were introduced, Plaintiff's Exhibit 5 (33), Bellevue's Summary for Inter-Institutional Transfer of Patients, shows that he suffered an injury to the zygomatic bone (cheekbone) for which surgery was performed on August 7, 1973. His injuries were substantial by any standard.

Conclusion

There was sufficient evidence for the jury to find that on July 26, 1973 excessive force was used against Plaintiff and that Gorman was responsible for failing to control the situation. However, the use of one general verdict where there were three separate claims and three separate Defendants could do nought

but confuse the jury. As the verdict was submitted, if the jury wanted to find against Gorman, they would also have to find against Malcolm and Schaefer when there was scant evidence to do so. Conversely, in order to exonerate Malcolm and Schaefer, they would also have to exonerate Gorman against whom there was substantial evidence. The effect was to deprive the jury of the opportunity to find against Gorman alone. Accordingly, the judgment should be reversed and the case remanded for a new trial as to Gorman's liability.

Respectfully Submitted,



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MARTINEZ v. MALCOLM, et al.
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SPECIAL VERDICT

1. Did the Correction Officers use unreasonable force against Mr. Martinez on July 26, 1973 at the Manhattan Detention Pens?

Yes

No

If your answer to Question #1 is "Yes", please answer the following questions:

- a) Were the Correction Officers under the control and supervision of defendant Benjamin Malcolm?

Yes

No

- b) Were the Correction Officers under the control and supervision of defendant James Gorman?

Yes

No

2. Did the Correction Officers use unreasonable force against Mr. Martinez on December 11, 1973 at Bellevue Hospital?

Yes

No

If your answer to Question #2 is "Yes", please answer the following questions:

- a) Were the Correction Officers under the control and supervision of defendant Benjamin Malcolm?

Yes

No

- b) Were the Correction Officers under the control and supervision of defendant Peter M. Schaefer?

Yes

No

(Continued)

3. Was Mr. Martinez unjustifiably placed
in segregation on January 19, 1974
by Correction Officers at The Tombs?

Yes

No

4. Was Mr. Martinez unjustifiably
continued in segregation on January 21-22,
1974 at The Tombs?

Yes

No

If your answer to either Question #3
or #4 is "Yes", please answer the
following questions:

- a) Were the Correction Officers under
the control and supervision of
defendant Benjamin Malcolm?

Yes

No

- b) Were the Correction Officers under
the control and supervision of
defendant Peter M. Schaefer?

Yes

No

Forelady

CERTIFICATE OF SERVICE

This is to certify that on September 19, 1977 a copy of the Appendix And Exhibits and of Appellants bBrief was seved on the Corporation Counsel of the City of New York, by mail, at his offices in the Municipal Building, New York, New York


STEPHEN M. LATIMER
Attorney for appellant